(3)

No. 90-228.

In the

Supreme Court of the United States.

OCTOBER TERM, 1990.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

PAUL R. COUTURE,
RESPONDENT.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE MASSACHUSETTS SUPREME JUDICIAL COURT.

Respondent's Brief in Opposition to Petition for a Writ of Certiorari.

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August 30, 1990

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Question Presented.

Whether the Fourth Amendment prohibits the police from conducting an investigative stop of a motor vehicle where the sole information is that its occupant is carrying a handgun.

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Respondent's Brief in Opposition to Petition for a Writ of Certiorari.

Respondent, Paul R. Couture, respectfully opposes the petition for a writ of certiorari to the Supreme Judicial Court of Massachusetts filed by petitioner, Commonwealth of Massachusetts.

REASONS WHY A WRIT SHOULD NOT BE GRANTED.

I. Introduction.

Rule 17 of the Rules of the Supreme Court states that "review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." Sup. Ct. R. 17.1. Rule 17 goes on to enumerate several reasons, not exclusive, for which this Court will grant a writ of certiorari. Only two of those reasons could conceivably apply to the instant case: (1) an important and unsettled question of federal law, Sup. Ct. R. 17.1(c); or a conflict with applicable decisions of the Supreme Court. Sup. Ct. R. 17.1(c). Since the instant case is distinguishable on it facts from prior decisions of this Court and is consistent with those decisions the petitioner has failed to meet the standard for granting certiorari under Rule 17.

II. The Court Should Not Grant a Writ as the Decision Below is Not in Conflict with Decisions of This Court Since It Is Distinguishable on its Facts.

The primary argument advanced by the Commonwealth of Massachusetts for granting a writ is that the decision in *Commonwealth* v. *Couture*, 407 Mass. 178 (1990) is in conflict with the decisions of this Court in *Terry* v. *Ohio*, 392 U.S. 1 (1968), *Adams* v. *Williams*, 407 U.S. 143 (1972), and *Michigan* v. *Long*, 463 U.S. 1032 (1983). Upon closer scrutiny of those decisions, it is clear that the Commonwealth's argument is misguided since *Couture* is distinguishable on its facts and is thereby consistent with those cases.

The holding of this Court in *Terry* v. *Ohio*, 392 U.S. 1 (1968) was narrow:

> We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

Terry v. *Ohio*, 392 U.S. 1, 30-31.

The *Terry* Court turned its "attention to the quite narrow question posed by the facts before [it]: whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for arrest." 392 U.S. at 15. In determining whether the seizure and search in *Terry* was reasonable under the Fourth Amendment the "inquiry was a dual one — whether the officer's action was justified at its inception and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* at 20. In "justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from these facts, reasonably warrant that intrusion." *Id.* at 21.

In *Terry*, while patrolling downtown Cleveland at 2:30 P.M., the officer's attention was drawn to two men he suspected of "casing a job" due to their walking past a storefront approximately twelve times during a ten to twelve minute period. *Id.* at 5-6. He also feared they may have had a gun. *Id.* at 6. The activities of "casing" the store for a robbery, were "specific and articulable facts" which justified the officer's actions at their inception and the officer concluded reasonably that "criminal activity was afoot." *Terry* v. *Ohio*, 392 U.S. at 23.

In *Couture*, the Supreme Judicial Court noted "there is absolutely no indication that the defendant in this case was engaged in criminal activity. The mere possession of a handgun was not sufficient to give rise to a reasonable suspicion that the defendant was illegally carrying that gun, and the stop was therefore improper under Fourth Amendment principles." *Commonwealth* v. *Couture*, 407 Mass. at 183. At the suppression hearing, Officer Gary Richardson of the Lowell Police Department testified that the only reason he stopped respondent's vehicle was that a man had left the store with a gun (A. 39). The officer further testified that prior to stopping the truck he had no evidence that respondent had committed a crime (A. 40). He was not stopped for motor vehicle violations (A. 40). Officer Richardson testified that he did not suspect respondent of shoplifting or attempted robbery at the store prior to stopping the truck (A. 38-39). It is evident the only crime for which the officer was seizing respondent's motor vehicle was possibly carrying a firearm without a license in violation of Mass. Gen. Laws c. 269, § 10. It was not until the vehicle had been stopped and searched that the officer inquired as to whether respondent had a gun license, hence, at the time of the initial stop of the vehicle he had no knowledge respondent did not possess a license to carry a firearm (A. 10). The Commonwealth embellishes the facts of *Couture* by stating the store clerk was in fear and suspected respondent of "casing"

the store and that respondent "did not immediately pull over" for the police (Petition 27, 30). Those allegations are not supported by the record of this case.

Since the record indicates that the police had no information to believe respondent was engaged in criminal activity prior to seizing his vehicle, the question becomes whether the mere possession of a handgun in a public place is "unusual conduct which leads [the officer] reasonably to conclude in light of his experience that criminal activity may be afoot," *Terry* v. *Ohio*, 392 U.S. 1, 30-31 (1968), thus justifying the officer's actions in stopping the vehicle "at their inception." 392 U.S. at 20.

Couture and *Terry* are distinguishable since *Terry* involved a brief street encounter between the officer and suspect, *Terry* v. *Ohio*, 392 U.S. at 5, while respondent was stopped when driving a truck. *Commonwealth* v. *Couture*, 407 Mass. at 179. Had respondent been observed carrying a firearm by the officer during a street encounter, it would seem reasonable under the Fourth Amendment for the officer to conduct a *Terry* stop to inquire with respect to a gun license. However, it is another matter for the government to have the power to stop a moving automobile and conduct a search based solely upon the belief that the suspect earlier possessed a handgun, since one has a greater expectation of privacy while travelling in an automobile than during a street encounter. *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Id.* at 461-462.

The Commonwealth of Massachusetts asks this Court to create a rule which would allow a police officer to operate with the presumption that mere possession of a firearm is evidence that "criminal activity is afoot." See *Terry* v. *Ohio*, 392 U.S. 1, 30 (1968). A presumption that firearms are inherently illegal is inconsistent with the Second Amendment to the Constitution of the United States which provides "A well regulated militia,

being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." U.S. Const. Amend. II. Such a presumption is also contrary to Article XVII of the Declaration of Rights of the Massachusetts Constitution which provides in part "the people have a right to keep and to bear arms for the common defence." Mass. Const., Part 1, Art. XVII. A constitution is not intended to provide merely for the exigencies of a few years, but is to endure through a long lapse of ages. *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816).

The Commonwealth also contends that *Couture* contradicts this Court's holdings in *Adams* v. *Williams*, 407 U.S. 143 (1972) and *Michigan* v. *Long*, 463 U.S. 1032 (1983). *Adams* is distinguishable from *Couture* since in *Adams* a person approached a police officer in a high crime area at 2:15 A.M. and informed him that an individual seated in a nearby vehicle was carrying *narcotics* and had a gun at his waist. *Adams* v. *Williams*, 407 U.S. at 144-145 (1972) (emphasis added). While the primary focus of the Court's opinion in *Adams* was on the reliability of the informant's tip, 407 U.S. at 147, the initial encounter was proper since the officer was investigating a violation of the narcotics laws.

Also different on its facts from *Couture* is *Michigan* v. *Long*, 463 U.S. 1032 (1983) in which two police officers patrolling a rural area at night observed a car travelling erratically and at excessive speed. *Id.* at 1035. The officers observed the car turning down a side road where it swerved into a ditch. *Id.* at 1035. The officers approached and observed the suspect and thought he was under the influence of something. *Id.* at 1036. They observed a large hunting knife on the floorboard of the driver's side of the car and also saw a bag of marijuana in plain view protruding from the armrest of the front seat. *Michigan* v. *Long*, 463 U.S. at 1036. A subsequent search of the trunk of the vehicle revealed seventy-five pounds of mari-

juana. *Id.* at 1036. In extending the stop and frisk principles of *Terry* to automobiles, the court in *Michigan* v. *Long* held "the *search* of the passenger compartment of an automobile . . . is permissible if the police officer possesses a reasonable belief based on specific and articulable facts . . . that the suspect is dangerous and the suspect may gain immediate control of weapons." *Id.* at 1049 (emphasis supplied).

In *Long*, the Court did not address the issue of what constitutes reasonable suspicion of criminal activity to justify the initial *stop* of the vehicle. In *Chambers* v. *Maroney*, 399 U.S. 42 (1970), the Court rejected the theory that there was a distinction between the power to seize a vehicle and the power to subsequently search the vehicle. 399 U.S. at 51-52. (See also *United States* v. *Ross*, 456 U.S. 798 (1982)). Beginning with the Court's decision in *Carroll* v. *United States*, 267 U.S. 132 (1925), the rule has been that there must be probable cause and exigent circumstances to initially stop an automobile. *Carroll* v. *United States*, 267 U.S. at 156. The Court in *Michigan* v. *Long*, 463 U.S. 1032 (1983), dealt with the situation where the initial intrusion into the area of privacy was based upon probable cause and the subsequent search was conducted pursuant to *Terry*. *Michigan* v. *Long*, 463 U.S. at 1037.

In both *Adams* v. *Williams*, 407 U.S. 143 (1972) and *Michigan* v. *Long*, 463 U.S. 1032 (1983), there were facts suggesting criminal activity which justified the seizure of the suspect; in *Adams* the officer had reliable information that the suspect illegally possessed narcotics and in *Michigan* v. *Long*, the officers had probable cause to stop the defendant for motor vehicle violations and to approach him once the car went into the ditch. As in *Terry*, neither of those cases involved a situation where the police initially stopped the suspect based upon the sole fact that the defendant possessed a firearm. The facts of *Couture* are clearly distinguishable from the prior decisions of this Court and *Couture* is not in conflict with *Terry* v. *Ohio*,

392 U.S. 1 (1968), *Adams* v. *Williams*, 402 U.S. 143 (1972) and *Michigan* v. *Long*, 463 U.S. 1032 (1983).

III. The Petition Should Be Denied Since It Does Not Address the Issue of Probable Cause to Search the Vehicle, Which the Supreme Judicial Court Decided on Independent State Grounds.

The Commonwealth concedes that the "petition only addresses the reasonable suspicion argument." (Petition 10, n.2.)

Assuming *arguendo* that the initial stop of the vehicle was supported by reasonable suspicion, the Commonwealth does not address the issue of whether there existed probable cause to search respondent and his vehicle. The Supreme Judicial Court held in *Commonwealth* v. *Couture*, 407 Mass. 178 (1990) that "[t]he police in this case had no reason to believe, before conducting the search of the vehicle, that the defendant had no license to carry a firearm." 407 Mass. at 181. "A police officer's knowledge that an individual is carrying a handgun, in and of itself, does not furnish probable cause to believe that the individual is illegally carrying that gun." *Id.* at 181. Article XIV of the Declaration of Rights of the Massachusetts Constitution provides in part "Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions." Mass. Const. Part 1, Art. XIV. Even if the Court should agree that the level of information available to the officer in the instant case justified the seizure of the vehicle under the Fourth Amendment, the subsequent search was found to be unreasonable under the Massachusetts Constitution. *Commonwealth* v. *Couture*, 407 Mass. 178 (1990).

The Commonwealth's petition thus becomes moot since in the event the Court decides the initial stop was reasonable under

the Fourth Amendment, the gun must still be suppressed as evidence at trial since the subsequent search was unreasonable under the Massachusetts Constitution.

Conclusion.

For the foregoing reasons, the respondent respectfully requests this Court to deny the petitioner a writ of certiorari in this case.

Respectfully submitted,

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